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Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-901

KATHRYN BURNS, et al.,
Appellants,

v.

BEN FORTSON, Individually
and in his capacity as
Secretary of State of Georgia; et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

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Appellees Ben W. Fortson, Jr., Secretary of State of the State of Georgia, and Jimmy Carter, Governor of the State of Georgia, move the Court to affirm the court below on the ground that the question on which the decision rests is so unsubstantial as not to need further argument and that the decision of the court below was correct.

STATEMENT OF THE CASE

The election law of the State of Georgia provides that voter registrars shall, in each year in which there is a November election, cease their operations of registering voters desiring to vote in that election fifty (50) days

prior to that election except that persons may register to vote up to fourteen (14) days prior to the election for the presidential and vice-presidential electors. Ga. Code §§ 34-611 and 602. In 1972, the voter registration books in Georgia closed on September 18 for those persons desiring to register to vote for all offices for which an election was held in November. Anyone who registered after this date but prior to fourteen (14) days before the election could only vote for the presidential and vice-presidential electors.

On September 21, 1972, a group of voters composed of voters registered to vote only in the presidential election, a voluntary voter registrar, and various political and voter groups (hereinafter "voter groups") filed a complaint with the Federal District Court for the Northern District of Georgia. The voter groups were seeking a temporary restraining order and a declaration that the above-described Georgia law was unconstitutional. The defendants, Ben Fortson, Secretary of State of the State of Georgia, and Jimmy Carter, Governor of the State of Georgia, (hereinafter "State") were provided less than one hour's notice of the impending action by the voter groups. The court, aware that time was of the essence, arranged to convene a three judge panel the very next day for the purpose of hearing and deciding the action filed by the voter groups.

At that hearing an opening statement was made by one of the attorneys for the voter groups. (T-5-25). The State then assumed the burden (T-26) and proceeded with its case by introducing evidence in the form of testimony from the registrar of the most populous county in the State, the former registrar of the second most populous county in the State, and the head of the Election Division

in the Secretary of State's Office. At the conclusion of this testimony, the State rested its case. The voter groups proferred no evidence of any kind but rested their case on the oral arguments of their attorneys.

At the conclusion of the final oral argument, the court handed down a decision from the bench denying the relief sought by the voter groups. That decision was reduced to writing in an Order filed September 27, 1972.

The voter groups then filed a Motion for a New Hearing on essentially the following grounds:

(1) The court applied the wrong test to the State law challenged;

(2) Witnesses for the defendants misrepresented the facts; and

(3) The voter groups did not have sufficient time to prepare their case.

In an Order filed October 12, 1972, the court below denied the request for a new hearing essentially because the evidence the voter groups wished to introduce was such that it could have been obtained prior to the original hearing. Since the voter groups had far greater time to prepare for the trial, they should have had the evidence ready to present at the evidentiary hearing on the merits.

The court below further, in the second Order, amended the original Order by providing that the burden of proof had been met by the State and that "the only evidence before the Court . . . demonstrate[d] that the fifty day period [was] necessary to promote a compelling State interest, namely the orderly, accurate and efficient administration of State and local elections, free from fraud." (Jurisdictional Statement, p. 7A).

ARGUMENT

I

THE DECISION OF THE COURT BELOW THAT FIFTY DAYS ARE REQUIRED BY COUNTY VOTER REGISTRAR'S OFFICES TO COMPLETE THE REQUIRED TASKS AND COMPILE AN ACCURATE VOTING LIST IS CORRECT INASMUCH AS IT IS BASED ENTIRELY ON THE EVIDENCE AND TESTIMONY PRESENTED TO THE COURT.

The essence of the voter groups' argument is that if the registrar can register voters up to fourteen days prior to the election to vote for presidential electors, he can register voters up to fourteen days before the election to vote in all elections. In other words, the fifty day cut-off is unnecessary and unconstitutional since the administrative cut off period is not the shortest feasible time. (T-24). Such an argument graphically points out the lack of understanding these voter groups have of the registration process. The testimony before the Court revealed the following facts pertinent to voter registration in Georgia.

Registrars close their books fifty days prior to an election except for those who register to vote only in the presidential election. Upon the closing of the books, registration cards of all the last minute registrants must be compiled. (T-33, 87). This could amount to as many as 7,000 accumulated over a three or four day period. (T-87). Most of these cards are really no more than information sheets and must be retyped to be legible and reflect accurate information. (T-34, 85). At this point

the cards are alphabetized, audited and cross checked against old registration lists to ascertain there are no duplications. (T-34, 89). When all of this is complete, it becomes necessary to determine the election districts in which the registrant is to vote. (T-37, 89). Finally, these cards are sent to the computer center for the keypunch operator to duplicate and the voter lists to be compiled. (T-42, 89). Since the voter list for each election district must be alphabetically arranged, no lists can be prepared until all registration for each applicant is completed. (T-41, 43).

During this time in addition to the above tasks, the registrar's office must prepare absentee ballots, answer numerous telephone inquiries, and change addresses on previously registered electors. (T-36, 89, 90, 91). Also, people can still register to vote in the presidential election only, up to fourteen days prior to the election. The question becomes, "What is different about those who are on the fourteen day list that they can continue to be registered?" There are numerous differences.

Those on the fourteen day list are much fewer in number than those who register just prior to the fifty day deadline. (T-50, 51, Compare T-78 and 96). The other and far more significant difference is that those registrants on the fourteen day list vote only at the court house; there is no need to determine what precinct and what ballot and on what individual voting list their name will appear. (T-50, 100, 101). In a county like DeKalb where there are 114 precincts and approximately 250 different ballots, this is significant. (T-37). That means that over 250 separate voter lists must be compiled, and since the lists are alphabetical, they cannot be printed until the very

last card is in. (T-41, 43). The determination of on which list a voter's name will appear is no easy process since many counties have congressional, state senatorial, school board and county commission districts whose boundaries do not coincide. (T-37). One polling place may have as many as five voting lists. (T-38). As if this were not enough in itself, reapportionment was effected by census tract which used such boundaries as creeks and alleys. (T-39). Consequently, it is necessary to go to the Board of Registrars to determine on exactly which list an elector's name should appear. (T-39, 40). The statement by the attorney for the voter groups that "when [a] man reports you know which ballot is proper for him . . ." is totally unfounded. (T-66).

It is realized that the jurisdictional statement for the voter groups cites testimony which could be erroneously construed to show that the fifty day period is not necessary, and that if fourteen days is sufficient time to process some registrants, it's long enough to process all registrants. However, the court below had before it the entire testimony of the three witnesses and reached a decision based on the cumulative effect of that testimony. (See Jurisdictional Statement, p. 3a).

The testimony clearly reflected that the fifty day cut-off period is necessary to ensure that the voter lists will be out in time for the election. (T-35, 38, 42, 52, 98). It should further be pointed out that the length of time required is not attributable to a lack of effort or diligence on the part of the county registrars. The registrar's offices work nights, Saturdays, and some Sundays during this fifty day period in an effort to get accurate lists to the polls before the election. (T-44, 45, 95). More people

and typewriters are not necessarily the answer. This obviously would reduce the time somewhat, but it's impossible to say how much. (T-99). There is the additional problem of training new personnel, and the fifty days prior to an election is no time to train them. (T-46). Since there was never any evidence presented to indicate how many days this administrative period could be reduced, the court below would not hazard a guess at how many it could be reduced without concrete evidence. (Jurisdictional Statement, p. 5a).

It is clear that the only evidence before the Court established that a fifty day period in which administrative tasks must be performed by voter registrars under the Georgia election law is absolutely necessary. With no other evidence before the court, it is difficult to image what other decision could have been reached.

II

THE BURDEN OF PROOF IN THE HEARING BEFORE THE COURT BELOW WAS ASSUMED AND CARRIED BY THE STATE, AND THE EVIDENCE ESTABLISHED THAT THE LAW PROVIDING A FIFTY DAY PERIOD IN WHICH REGISTRAR'S BOOKS ARE CLOSED TO PREPARE VOTING LISTS FOR THE IMPENDING ELECTION IS NECESSARY TO PROMOTE A COMPELLING STATE INTEREST.

The voter groups' argument pertaining to the test applied to the Georgia law in question and the party upon whom the burden of proof was placed at the hearing is in reality one argument and will be treated accordingly.

It is recognized that this Court has determined that laws that limit the right to vote must satisfy the compelling state interest test. *Dunn v. Blumstein,* 405 U.S. 330 (1972). However, it should also be recognized that only two months earlier in another voting case, this Court stated that laws that have an impact on voting must be closely scrutinized and found reasonably necessary to the accomplishment of legitimate state objectives. *Bullock v. Carter,* 405 U.S. 134 (1972). No doubt the standard applied by the Court in either instance varied little and the burden fell upon the State to justify the restrictions on the franchise. It was simply a matter of different terminology being used. The voter groups blithely refer to the lower court's "*ex post facto* insertion of a magic formula." (Jurisdictional Statement, p. 15). However, the "magic formula" is indeed theirs. To follow their argument in regard to the compelling state interest test, it is only necessary that they establish that the constitutionality of a state law be measured by this standard, and there is nothing that can be shown or proven to meet this test.

The real issue is, "Who has the burden of proof?" It is very clear from the transcript and the court's order that the burden of proof was assumed by the State. (T-26). There was never any question by the State as to whether or not they had the burden of proof. The State assumed the burden of proof, put up witnesses whose testimony carried the burden of proof, and closed the case. (T-26 through T-115). The voter groups chose to put up no evidence at the close of the State's case. (T-116). The heart of the voter groups' complaint is found in the following statement:

> "At the conclusion of the hearing, believing that Defendants had not met their 'heavy burden,' plaintiffs chose to introduce no further evidence." (Jurisdictional Statement, p. 21, 22).

In other words, they made a tactical decision during the hearing which proved to be erroneous. The court below found that the burden of proof was met by the evidence produced in the hearing. (Jurisdictional Statement, p. 7a). The voter groups did not reach the same conclusion as the court in regard to whether the burden of proof was met by the State and that is the crux of their complaint. The burden was originally on the State; the State carried the burden, and it became necessary for the voter groups to refute or overcome the evidence produced at the hearing by the State. This is hardly an unexpected shifting of the burden.

One point should be made in regard to the denial of a new hearing. The voter groups sought a new hearing by presenting affidavits and other documents to the court accompanying a motion for a new hearing. Many of these affidavits and documents had been in the possession of the voter groups for some time. Some of the documents were answers to a questionnaire that was sent out to all the registrars in Georgia by the voter groups. The questionnaires were vague and ambiguous as were many of the answers. However, the point is that when the voter groups filed their case in the Federal District Court after giving the State some thirty minutes' notice, they filed four affidavits, an eight page Complaint, a Motion for Injunction and a Motion for Temporary Restraining Order and an eleven page Brief in Support of that Motion. The Court and the State did everything possible to pre-

pare for a hearing the next day and accommodate these voter groups. The fact that the voter groups did not get all of the evidence before the court, or for that matter any evidence before the court that they wanted to, was no one's fault but their own. They obviously had been working on the case for some time, and they should not be heard to complain that they were unable to present all the evidence in the hearing that might aid in their cause. They had their day in court, and it was a day they chose.

The court below did not apply the wrong test to the Georgia law, nor did it impose an undue burden on the voter groups. The burden of proof was assumed and carried by the State in such a manner as to prove that the fifty day cut-off period is necessary to promote the compelling state interest of an orderly, accurate, and efficient administration of state and local elections free from fraud.

CONCLUSION

The appellees, Secretary of State of the State of Georgia, and Governor of the State of Georgia respectfully submit that the decision of the Court below should be affirmed inasmuch as the appellants present no substantial question for decision by this Court and the decision in the court below was correct.

Respectfully submitted,

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